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Products Liability—Application of UCC Sales Article Policy to Leased Chattel

Robert Baker went to a city golf course and leased an electric golf cart. He was injured when the brakes on the cart failed and it overturned on him. On a motion for summary judgment, the defendant pleaded a disclaimer of liability clause in the rental agreement.[1] The trial court ruled for defendant. The Court of Appeals affirmed,[2] and the plaintiff appealed. *Held*: reversed. The disclaimer clause placed inconspicuously in the middle of the golf cart rental agreement was void as against the public policy of the Uniform Commercial Code. *Baker v. City of Seattle,* 484 P.2d 405 (Wash. 1971).

Although the Uniform Commercial Code [hereinafter referred to as the UCC] sales article does not expressly apply to leased goods, the *Baker* court found no material difference between a sale and a lease.[3] The court cited *W. E. Johnson Equipment Co. v. United Airlines, Inc.,*[4] which said:

> The reasons for imposing the warranty of fitness in sales cases are often present in lease transactions. Public policy demands that in this day of expanding rental and leasing enterprises the consumer who leases be given protection equivalent to the consumer who purchases.[5]

The *Baker* court further stated that the Washington legislature had announced a public policy in regard to disclaimers of liability by

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[1] The disclaimer was in the middle of the agreement and of the same size print as the body of the agreement. Thus, it could have been observed only by reading the entire contract. The disclaimer read as follows: "It is expressly understood and agreed that the lessor shall not be liable for any damages whatsoever arising from injuries to the person and/or property damage or loss, of the Lessee arising from the use of, operation of, or in any way connected with said cart or any part thereof, from whatever cause arising." Baker v. City of Seattle, 484 P.2d 405, 406 (Wash. 1971).

[2] 2 Wash. App. 1003, 471 P.2d 693 (1970).

[3] 484 P.2d at 407. Many legal writers have advocated finding an implied warranty of fitness in bailments for hire. The *Baker* court cited the following articles that discuss this trend: Farnsworth, *Implied Warranties of Quality in Non-Sales Cases,* 57 COLUM. L. REV. 653 (1957); Note, *Bailee's Rights Against Bailor—A Look At The Developments,* 4 WILLAMETTE L.J. 421 (1967); Note, *The Extension Of Warranty Protection To Lease Transactions,* 10 B.C. IND. & COM. L. REV. 127 (1968).

[4] 238 So. 2d 98 (Fla. 1970).

[5] *Id.* at 100.

enacting the UCC. It cited subsection (2) of UCC section 2-316[6] which states that an exclusion or modification of the implied warranty of merchantability must mention merchantability, and in the case of a writing, must be conspicuous. The court also cited subsections (1) and (3) of UCC section 2-719[7] which provides that consequential damages may be limited or excluded unless it would be unconscionable to do so and that the limitation of consequential damages in personal injury cases resulting from the use of consumer goods is prima facie unconscionable.[8] The court concluded therefore that since the disclaimer was contained in the middle of the contract and was not conspicuous, it would not operate to exclude the defendant's liability.

Other courts have used UCC-derived public policy in non-sales cases. In the Florida decision of *W. E. Johnson Equipment Co. v. National Airlines, Inc.*,[9] the plaintiff recovered from the manufacturer of a leased forklift after the lift dropped and injured a wheelchair

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[6] UCC § 2-316(2) reads as follows:
(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "there are no warranties which extend beyond the description on the face hereof."

[7] UCC § 2-719(1) and (3) read as follows:
(1) Subject to the provisions of (2) and (3) of this subsection and of the preceding section [§ 2-718] on liquidation and limitation of damages
(a) the agreement may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and
(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.
(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

[8] Many courts when applying the UCC to leases use one or more of the UCC provisions. Most frequently cited provisions refer to implied warranties of merchantability (UCC § 2-314) or implied warranties of fitness for a particular purpose (UCC § 2-315). The court may deal with the exclusion or modification of these warranties (UCC § 2-316) or apply the principles of unconscionability to the contract (UCC § 2-302).

[9] 238 So. 2d 98 (Fla. 1970).

passenger. The court applied section 2-315[10] but noted that a warranty of fitness would not arise in all lease transactions.[11] In a New Jersey case, *Cintrone v. Hertz Truck Leasing & Rental Service*,[12] the court extended the coverage of a warranty of fitness to the plaintiff-employee when the brakes failed on a truck leased by the plaintiff's employer. In *Fairfield Lease Corp. v. Commodore Cosmetique Inc.*,[13] a New York beauty parlor leased a coffee-making machine and stopped rental payments when the machine failed to operate properly. In an action for the rental payments, the defense was breach of an implied warranty of fitness under section 2-315. The New York court held that with the placing of the coffee vending machine went an implied warranty of fitness that the machine would be suitable for use with a minimal degree of care by the lessee.[14]

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[10] UCC § 2-315 is an implied warranty of fitness for a particular purpose and reads as follows:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section [§ 2-316] an implied warranty that the goods shall be fit for such purpose.

[11] The court listed several factors to consider when deciding whether or not to apply the UCC to lease transactions. These factors were:
(1) Whether the lessor possessed or should have possessed expertise in the characteristics of the leased chattel
(2) Whether the lessee's reliance upon the lessor's selection of a suitable chattel was commercially reasonable
(3) Whether the lessor was a mass dealer in the chattel leased or whether the transaction was an isolated occurrence
(4) The total commercial setting of the transaction
The court formulated a general rule which reads as follows:

> In the absence of an agreement to the contrary, where the lessor has reason to know any particular purpose for which the leased chattel is required and that the lessee is relying upon the lessor's skill or judgment to select or furnish a suitable chattel, there is an implied warranty that the chattel shall be fit for such purpose.

238 So. 2d 100.

[12] 45 N.J. 434, 212 A.2d 769 (1965).

[13] 7 UCC Rep. Serv. 164 (N.Y.C. Civ. Ct. 1969).

[14] Other cases extending UCC policy to chattel leases include *Hertz Commercial Leasing Corp. v. Transportation Credit Clearing House, Inc.*, 59 Misc.2d 226, 298 N.Y.S.2d 392 (Civ. Ct. 1969), in which the court applied the UCC to a lease with a disclaimer of implied warranty and noted that the UCC could also be applicable to a bailment. The court said that a disclaimer of warranty clause in the lease would have to conform to UCC § 2-316 as to conspicuous print. In *Sawyer v. Pioneer Leasing Corp.*, 244 Ark. 943, 428 S.W.2d 46 (1968), the court applied the provisions of the UCC governing disclaimer of implied warranty of merchantability and implied warranty of fitness to a lease and rendered judgment for the lessee. In both *Hertz* and *Sawyer* the leases were analogous to sales and this may have had some bearing on the decision. In *Sawyer* the court strongly emphasized the point that Pioneer would have sold the machine to Sawyer at the termination of the lease had a price been agreed upon. In *Hertz* there were several factors that made the lease similar to a sale:

These cases represent a movement toward flexible construction of statutory law, a trend contrary to the old axiom that statutes conflicting with the common law are to be strictly construed.[15] Perhaps prophetically, Dean Pound predicted sixty years ago that eventually statutory law would be looked upon as superior to judge-made law.[16] This forecast seems to be coming true. The *Baker* case and others discussed previously have witnessed extension of the policies of a sales code to leased goods. Some courts have even applied the policies of the UCC to cases that arose before the UCC became law in those jurisdictions.[17]

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1. The total lease payments over the five year term of the lease were $6,636.60 while the equipment cost was $5,009.37.
2. The lease was, in effect, renewable forever should the lessee so desire.
3. The lessee had to pay all maintainence, repairs, and taxes incident to obtaining and use of the machine.
4. The lessee had the right to exclusive use of the machine, at least until it no longer had any market value.

Some courts have refused to extend the UCC to the non-sales area. A New York trial court in *Busch v. United Aluminum Metal Products Corp.*, 8 UCC Rep. Serv. 335 (N.Y. S.Ct. 1970) held that a contract for the remodeling of the plaintiff's kitchen was not a sale, but a contract for work, labor and services which did not give rise to an implied warranty of fitness. In *Garfield v. Furniture Fair-Hanover*, 8 UCC Rep. Serv. 1004 (N.J. Super L. Div. 1971), the court held that the plaintiffs could not recover on the theory of breach of implied warranty since a bailment rather than a sale was involved.

[15] Murray, *Under the Spreading Anology of Article 2 of the Uniform Commercial Code*, 39 FORD. L. REV. 447 (1971).

[16] Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908).

[17] *See* Greenberg v. Lorenz, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961), in which the New York court accepted the principle of UCC § 2-318 one year before New York adopted it. UCC § 2-318 states:

> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of warranty. A seller may not exclude or limit the operation of this section.

See also Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), in which the New Jersey court accepted the unconscionability principle of UCC § 2-302 one year before New Jersey's adoption of the UCC. UCC § 2-302 reads:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

The Uniform Commercial Code became law in West Virginia in 1964.[18] The West Virginia court has not yet applied the policy of the UCC to a bailment for hire. However, in *Williams v. Chrysler Corp.*,[19] the court intimated what it might do in a situation where the UCC was not directly applicable, presumably including a non-sale case. In *Williams,* a passenger sued the buyer and manufacturer of a new Dodge automobile and the defendant buyer cross-claimed against the manufacturer. The accident which gave rise to the suit occurred in 1959, five years prior to adoption of the UCC. The buyer sued on the *MacPherson v. Buick*[20] theory that the supplier of chattels owed a duty of due care to the ultimate user. The court, although using a warranty disclaimer to deny recovery, suggested that the adoption of the UCC may have affected the law significantly. The court said: "Even if the provisions of the [UCC] were not directly applicable, we would be among those states 'wherein the doctrine of public policy was used in connection with allowing implied warranties to be considered' as stated in the *Payne* case."[21]

A later West Virginia case, *Nettles v. Imperial Distributors, Inc.*,[22] involved a sale made before the UCC became effective in West Virginia. The court applied the policies of the UCC and held that there was an implied warranty.[23] The court said:

> While the provisions of the Uniform Commercial Code are not applicable to this case, we consider it reasonable to state that the adoption of that Code by the legislature of this state, and by legislatures of a great majority of the other states of the nation, demonstrates that anciently conceived

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[18] W. VA. CODE ch. 46, arts. 1-10 (Michie 1966).

[19] 148 W. Va. 655, 137 S.E.2d 225 (1964).

[20] MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

[21] Williams v. Chrysler Corp., 148 W. Va. 655, 664, 137 S.E.2d. 225, 231 (1964). The *Payne* case referred to by the *Williams* court is Payne v. Valley Motor Sales, 146 W. Va. 1063, 124 S.E.2d 622 (1962). These two cases were discussed by Professor Lorensen, in *Product Liability and Disclaimers in West Virginia,* 67 W. VA. L. REV. 291, 296 (1965). He suggests that two points emerge from the quoted statement of the court in *Williams*: "First, the court indicates that policy implications arise from the adoption of the Uniform Commercial Code which radiate beyond its express terms. Second, the court suggests that these policy implications bode well for the consumer."

[22] 152 W. Va. 9, 159 S.E.2d 206 (1968). Plaintiffs purchased a mobile home from defendant who had incorrectly installed some gas fittings in its stove. When plaintiff attempted to light the burners, the stove exploded.

[23] *Id.* The court noted that the sale contract was entered into prior to the adoption of the UCC in West Virginia and that the circuit court therefor properly applied pre-UCC law. However, the court distinguished the case from prior decisions governing implied warranties and the *caveat emptor* doctrine.

> principles relating to implied warranties should be reasonably extended, and that similarly conceived principles relating to the doctrine of *caveat emptor* should be reasonably restricted in scope in the light of the vast change in the nature of chattels commonly sold and purchased in this day.[24]

Perhaps the language in *Williams* and *Nettles* could be used as a basis for applying the UCC to non-sales transactions in West Virginia.

Baker v. City of Seattle is an example of an accelerating trend towards using UCC policy in non-sales cases. *Baker* and the other cases like it could provide a strong base for extending UCC policy to bailments for hire in West Virginia. Its theory should not be overlooked.

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Taxation—Loss Carry-Back Privileges of F Reorganizations

An individual owned 123 corporations, each engaged in one of three activities: supplying building materials, constructing low-cost housing, or marketing houses. These corporations substantially dealt among themselves and were centrally managed by the Lee Development Construction Company, Inc. Although each of these corporations was itself an independent unit, it was also a member of a larger integrated commercial organization. In 1962 the owner was seeking continued expansion and merged all the corporations into Lee Quality Homes Corporation to establish a better credit basis. Two years later, the corporation changed its legal name to Home Construction Corporation of America. The only operational changes caused by the consolidation were adoption of a common tax year and simplified accounting procedures. The 123 former corporations became 123 divisions of the Home Construction Corporation of America.

The parent corporation suffered net operating losses in 1963 and 1964 and filed claims for tax refunds by carrying back the losses and setting them off against the taxable income of the 83 previous

[24] 152 W. Va. 9, 21, 159 S.E.2d 206, 214 (1968).